IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 832 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJESHKUMAR @ GUDDU JASHVAN SINH YADAV - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR appointed by Legal Aid Committee for Appellant(s) : 1,
MR. L.R.PUJARI, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 26/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellant ('the accused' for short) and another accused, who has been acquitted, were charged and tried by the learned Additional Sessions Judge, Fast Track Court no.1, Vadodara in NDPS Case No. 10 of 2000 for commission of the offence u/s 8(c) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), arraigned on the charge of having found with contraband article '4 bars of charas' weighing 1 kg. 626 grams, when they were apprehended by PW-4 Premdhar Amarnath Shukla, In-charge, PI, LCB Branch and PW-10 M.U.Mirza, PI, LCB Western Railway Vadodara, while they were patrolling at Platform No.2 and 3 of Vadodara Railway Station on 17.9.2000 at 2:35 PM.

2. At the end of the trial the accused was held guilty of the offence with which he was charged as his complicity is proved. Therefore, the trial Court convicted him vide judgment and order dated 27.9.2002 for commission of the offence under Section 8(c) read with Section 22 of the NDPS Act and sentenced him to suffer RI for 10 years and fine of Rs.1 lac, i.d. RI for further period of 1 year.

3. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused has filed appeal u/s 374 of the Code of Criminal

Procedure Code (“the Code” for short).

4.Briefly stated the prosecution case as disclosed from the FIR and unfolded during trial, is as under:

4.1 On 17.9.2000 at 14:00 hrs., PW-4 Premdhar Amarnath Shukla Incharge PI, LCB Western Railway Vadodara, Revabhai Mavjibhai, Laxmansinh Chandersinh Rathod, Head Constable, Hasnamahomad Valimohomad, Unarmed Head Constable, Jagdishkumar Kantilal, Police Constable, Firozkhan Nasibkhan, Police Constable, and Rameshbhai Manilal, Police Constable of LCB, Western Railway, Vadodara, were on patrolling at platform nos. 2 and 3 of Vadodara Railway Station. They saw two persons sitting with bags, near water tap. On seeing the police staff, both of them suddenly stood up and walked towards Southern end. PW-3 Laxmansinh Chandersinh Rathod, Unarmed Police Constable, Jagdishkumar Kantilal, Police Constable, and Firozkhan Nasibkhan, Police Constable doubted and ran after them and stopped both of them. On making inquiry, they were hesitating and appeared to be afraid. Their movement being doubtful, both of them were brought to the office of PSI, LCB, Vadodara. PW-3 Laxmansinh Chandersinh Rathod immediately called 2 panchas namely PW-1 - Virundrakumar Omprakash Sharma and PW-5 Kalicharan Harilal Agarwal.

They were asked to remain as panchas of a search panchnama as there was possibility that the two persons had offendable articles in their bags. Both the persons gave their willingness to be searched in presence of the two panchas. As both the persons were speaking Hindi, both were explained in Hindi about making search on their person and were also asked whether they wanted to search the police persons, they negatived. The two persons who were caught, were asked their names, one of whom stated his name as Rajeshkumar @ Guddu Jashvantsinh Yadav, aged 35 years, residing at Bedpur, Taluka Bharathna Thana Usarahar Dist. Itava, U.P. He was asked to give the key of his bag and he took out the key from his pocket of the pant and gave it. On opening the bag with the said key, a photo of Saibaba Shirdi was in uppor part and two injections and one lungi and there were plastic bags below it and two bars in one bag and two bags containing one Bar each were found from his VIP bag of Safari Alfa Company. Upon asking about the said four Bars in plastic bags, Rajeshkumar Yadav stated the same to be Charas. After removing the plastic bags from the said Bars, the Bars were of black-brown coloured. The same was smelt by the police personnels and the panchas and confirmed the smell of charas. He, therefore, was asked if he is required to

be examined in the presence of any other gazetted officer or a Executive Magistrate. He refused to be searched by a gazetted officer or a Executive Magistrate. Hasanmomahammad Valimohammad, an Unarmed Head Constable was asked to call a weighing machine to weigh the said Charas Bars. Firozkhan Naseebkhan, a Police Constable was also sent with a written yadi to call an officer from FSL. On checking the person of Rajeshkumar, currency note of Rs.90/-, a second class ticket dated 16.9.2000 from Ujjain to Vapi and a raxine cover in the name of Rajeshkumarsinh Guddu in Hindi were found. Upon asking the name of second person, he stated his name as Surendrakumar Shaligram Kushva, aged 60 years, residing at Rampurapachar, Taluka Bharathana Thana Ushrahar, District Itava, U.P.. He was also asked as to whether he wanted to keep any gazetted officer or a Executive Magistrate during search. He also refused to be searched by any gazetted officer of a Executive Magistrate. No offendable article was found from his bag or the person of said Surendrakumar. Only the currency notes of Rs.1200/- were found.

4.2 In the meantime Hasanmohammad, Head Constable brought Prabhudayal Kishanlal Thakore with an electric weighing machine. The weight of the Charas bars are as under:

Particular	**Weight KG Grams**	**Value in Rs.**
Bar no.1	00.520	20800.00
Bar no.2	00.556	22240.00
Bar no.3	00.270	10800.00
Bar no.4	00.280	11200.00
	1.626	**65040.00**

4.3 16 grams from Bar no.1, 12 grams from Bar no.2, 10 grams from Bar no.3 and 12 grams from Bar no.4 were taken from the aforesaid four Charas Bars in presence of the panchas and placed in four plastic bags.

4.4 At that time Ashokbhai R. Vaghela, Scientific Officer came with kit from FSL, Vadodara.. On making test on the said Charas Bar differently, the result was positive and prima facie the presence of Narcotic substance Charas was found and the certificate, in this respect was obtained. Out of the said 4 Chars Bars, about 12 grams from Bar no.1, 2 grams from Bar no.2, 6 grams from Bar no.3 and 8 grams from Bar no.4 were taken out and placed in plastic bags. A receipt regarding the aforesaid weight is obtained from PW-2 Prabhudayal Kishanlal Thakore and kept on record.

4.5 Upon asking Rajeshkumar regarding the quantity which was found, he stated the same to have been supplied by Surendrakumar Kushva. Upon asking about any licence or permission for trafficking the quantity of Charas illegally, both the persons replied in negative.

4.6 The samples, taken from the Charas Bars for FSL, were kept in plastic bags and stappled. The same were placed in plastic small boxes and the slips bearing signature of the panchas were kept and tied with string. The wax seal of PI, LCB Railway Vadodara, in English, was affixed thereon and placed in different cloth bags and sealed again. All the other articles recovered from both the persons were also seized. Both the persons were arrested for commission of the offence under the NDPS Act and a letter stating the reasons of arrest was served to them.

4.7 The complaint for the aforesaid incident was filed by PW-4 Premdhar Amarnath Shukla in LCB Police Station, Western Railway, Vadodara against both the accused for commission of the offence u/s 8(c) read with Section 21 of the NDPS Act.

4.8 On filing of the complaint, investigation was carried out by PW-8 Omkarnath Shivbahadur

Tiwari and PW-9 Ghanshyamsinh Mansinh Zala. During the course of investigation, statement of witnesses was recorded. The contraband article Charas which was kept in the safe custody of PW-7 Dalpatsinh Kalyansinh was sent to FSL for analysis through PW-6 Natwarsinh Sankalsinh. On receipt of the report from the FSL certifying that the same was Charas and as the sufficient incriminating evidence was found against both the accused, charge sheet was filed by PW-9 Ghanshyamsinh Mansinh Zala against both the accused in the Sessions Court at Vadodara on 17.10.2000 for commission of the offence under Section 8(c) read with Section 21 of the NDPS Act.

4.9 The learned Additional Sessions Judge, Fast Track Court No.1, Vadodara before whom the trial was made over for trial, framed charge against both the accused for commission of the offence u/s 8(c) read with Section 21 of the NDPS Act. It was read over and explained to them. As the accused persons pleaded not guilty to the charge and claimed to be tried, they were tried in NDPS Case No. 10 of 2000.

4.10 In order to bring home the charge levelled against the accused, the prosecution has examined in all 10 witnesses, details of which are given in pargraph 11 of the

impugned judgment. They are as under:

Status	Name	Exh. No.	Page
PW-1	Virendra Ompakash Sharma	16	33
PW-2	Prabhudayal Kishanlal Thakore	36	50
PW-3	Laxmansinh Chandersinh Rathod, Police Constable, Patrolling Staff	36	53
PW-4	Premdhar Amarnath Shukla, PSI, Patrolling Staff.	39	58
PW-5	Kalicharan Harilal Agarwal	42	68
PW-6	Natwarsinh Sankalsinh, Police Head Constable.	59	73
PW-7	Dalpatsinh Kalyansinh, PSI	63	78
PW-8	Omkarnath Shivbahadur Tiwari, IO	66	82
PW-9	Zala Police Inspector, IO	70	85
PW-10	M.U.Mirza, PI, Patrolling Staff	71	87

4.11 To prove the culpability of the accused,

the prosecution has also produced number of documents and relied upon the contents of the same, details of which are enumerated in paragraph 12 of the impugned judgment and order. They would be referred to in this judgment and order as and when required.

4.12 After recording of the evidence of the prosecution witnesses was over, the learned Special Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement they denied the case of the prosecution in toto and stated that they have been falsely implicated in the case. However, they neither led any evidence nor did they examine any witness to support their defence.

4.13 On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial court held that the complicity of accused no.2 has not been established as he was not found with contraband article Charas, therefore, he was acquitted of the offence with which he was charged, whereas complicity of accused no.1, has been established, as he was found with the contraband article Charas kept in his bag, which was opened by him with his key and

the key was lying in his pocket. Therefore, the accused no.1 was held guilty for the offence punishable u/s 8(c) read with Section 22 of the NDPS Act. The trial Court, therefore, convicted him vide judgment and order dated 27.9.2002 for commission of the offence punishable u/s 8(c) read with Section 22 of the NDPS Act and sentenced to suffer RI of 10 years and fine of Rs.1 lac, i.d. of payment of fine RI for further period of 1 year, which has given rise to this Appeal at the instance of original accused no.1.

5. Ms. Sadhana Sagar, learned advocate, appointed by the Legal Aid Committee for the accused, has contended that the prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained under the NDPS Act and, therefore, on account of non-compliance of the provisions of NDPS Act, the prosecution evidence cannot be relied upon and cannot be acted upon. She further contended that PW-1 Virendra Omprakash Sharma and PW-5 Kalicharan Harilal Agarwal who are the panch witnesses and according to the prosecution case in whose presence contraband article Charas was recovered from accused no.1, and, since they are the independent witnesses, have not supported the prosecution case, the prosecution has failed to establish

the charge levelled against the accused. It is highlighted by her that the prosecution has failed to establish the fact that the muddamal contraband article reached the FSL intact and there was possibility of tampering with the muddamal on its journey from the time of seizure and filing of the complaint till it reached to the FSL. According to her, there is non-compliance of the provisions of Sections 50, 52 and 55 of the NDPS Act. The trial Court has erred in holding that the muddamal Charas was properly and legally handled and it was not tampered with till it reached at FSL in sealed intact condition. She has also highlighted that there is a discrepancy in the weight of four samples in panchnama exh. 17 as well as FSL report exh. 74-75, and therefore, there is a reason to believe that the muddamal Charas was tampered with during the course of the journey from police station to FSL. On the aforesaid premises, it is submitted by her that the prosecution has failed to establish the charge levelled against the accused beyond reasonable doubt and, therefore, the impugned judgment and order of conviction and sentence deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offences with which he was charged. She, therefore, urged to allow the appeal.

6.In counter submission, Mr. L.R.Pujari, learned APP for the respondent – State of Gujarat has submitted that by voluminous evidence produced by the prosecution, the complicity of the accused is proved beyond reasonable doubt. The accused was intercepted and apprehended at platform no. 2 and 3 of Vadodara Railway Station, by PW-4 Premdhar Amarnath Shukla, PSI and PW-10 M.U.Mirza while they were on patrolling. He has also submitted that after following the mandatory provisions contained in the NDPS Act, the contraband article was seized and sealed in presence of the members of the raiding party as well as panchas. It is also submitted by him that the report of FSL in terms certified that the contraband article which was sent for analysis was Charas. It is also asserted by him that the prosecution has successfully established that the sample sent to FSL was not tampered with during the course of its journey from the stage of seizure and filing of the complaint till reaching at FSL. It is also pointed out by him that the panchas turning hostile is not unknown to criminal jurisprudence and that now-a-days it is on increase but that fact itself does not weaken the case of the prosecution as the case does not depend solely on the evidence of the panch witnesses. According to him if the evidence of the members of the raiding party

is of sterling quality then there is no reason to discard their evidence and on the basis of the evidence of the members of the raiding party, order of conviction can be passed. So far as discrepancy in the weight of four samples in the panchnama and FSL report are concerned, the said discrepancy is of very meager weight, which varies from 1 gram to 1 ½ gram, which is possible as it was weighed on two different scales. One scale which was brought by the Police Officer at the time of seizure and sealing and another weighing scale of FSL and, on this count, prosecution case cannot be thrown over board. On the aforesaid premises, according to Mr. L.R.Pujari, learned APP, the prosecution has established the case against the accused beyond reasonable doubt and, therefore, the trial court has rightly recorded the order of conviction and sentence. He further submitted that the impugned judgment and order does not call for any interference of this court in this appeal and as the appeal lacks merit, it deserves to be dismissed. He, therefore, urged to dismiss the appeal.

7. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a compete and comprehensive appreciation of

all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

8. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

9. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003

SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

“The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith”.

10. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether

in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector and the Police Sub Inspector during the course of search of the accused and seizure of the muddamal, contraband article, charas.

11. In this connection, we shall first refer to the oral testimony of P.W-4 Premdhar Amarnath Shukla at exh. 39, page 58 of the paper book. He has inter alia testified that on 17.9.2000 he was Incharge Inspector in LCB Branch, Vadodara Railway Station. On that day at 2:00 p.m. He and PW-10 M.U.Mirza and Police Officer were patrolling at platform no. 2 and 3 at Vadodara Railway Police Station. At that time they saw two persons sitting with bags, near water tap. On seeing the police staff, both of them suddenly stood up and walked towards Southern end. PW-3 Laxmansinh Chandersinh Rathod, Unarmed Police Constable, Jagdishkumar Kantilal, Police Constable, and Firozkhan Nasibkhan, Police Constable doubted and ran after them and stopped both of them. On making inquiry, they were hesitating and appeared to be afraid. Their movement being doubtful, both of them were brought to the office of PSI, LCB, Vadodara. PW-3 Laxmansinh Chandersinh Rathod immediately called 2 panchas namely PW-1 - Virundrakumar Omprakash Sharma and PW-5 Kalicharan Harilal Agarwal.

They were asked to remain as panchas of a search panchnama as there was possibility that the two persons had offendable articles in their bags. Both the persons gave their willing to be searched in presence of the two panchas. He has testified that, as both the persons were speaking Hindi, both were explained in Hindi about making search on their persons and were also asked whether they wanted to check the police persons, they negatived. The two persons who were caught, were asked their names, one of whom stated his name as Rajeshkumar @ Guddu Jashvantsinh Yadav, aged 35 years, residing at Bedpur, Taluka Bharathna Thana Usarahar Dist. Itava, U.P. He was asked to give the key of his bag and he took out the key from his pocket of the pant and gave it. On opening the bag with the said key, a photo of Saibaba Shirdi was in uppor part and two injections and one lungi and there were plastic bags below it and two Bars in one bag and two bags containing one Bar each were found from his VIP bag of Safari Alfa Company. Upon asking about the said four Bars in plastic bags, Rajeshkumar Yadav stated the same to be Charas. After removing the plastic bags from the said Bars, the Bars were of black-brown coloured. The same was smelt by the police personnels and the panchas and confirmed the smell of charas. He, therefore, was asked if

he is required to be examined in the presence of any gazetted officer or a Executive Magistrate. He refused to be searched by a gazetted officer of a Executive Magistrate. Hasanmomahammad Valimohammad, an Unarmed Head Constable was asked to call a weighing machine to weigh the said Charas Bars. Firozkhan Naseebkhan, a Police Constable was also sent with a written yadi to call an officer from FSL. On checking the person of Rajeshkumar, a currency note of Rs.90/-, a second class ticket dated 16.9.2000 from Ujjain to Vapi and a raxine cover in the name of Rajeshkumarsinh Guddu in Hindi were found. Upon asking the name of second person, he stated his name as Surendrakumar Shaligram Kushva, aged 60 years, residing at Rampurapachar, Taluka Bharathana Thana Ushrahar, District Itava, U.P. He was also asked as to whether he wanted to keep any gazetted officer or a Executive Magistrate during search. He also refused to be searched by any gazetted officer or a Executive Magistrate. No offendable article was found from his bag or the person of said Surendrakumar. Only the currency notes of Rs.1200/- were found. He has testified that in the meantime Hasanmohammad, Head Constable brought a weigher Prabhudayal Kishanlal Thakore with an electric weighing machine. He has testified that the weight of the Charas

Bars as under:

Particular	**Weight KG Grams**	**Value in Rs.**
Bar no.1	00.520	20800.00
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	1.626	**65040.00**

He has testified that 16 grams from Bar no.1, 12 grams from Bar no.2, 10 grams from Bar no.3 and 12 grams from Bar no.4 were taken from the aforesaid four Charas Bars in presence of the panchas and placed in four plastic bags. At that time Ashokbhai R. Vaghela, Scientific Officer came with kit from FSL, Vadodara.. On making test on the said Charas Bars differently, the result was positive and prima facie the presence of Psychotropic substance Charas was found and the certificate, in this respect was obtained. Out of the said 4 Chars Bars, about 12 grams from Bar no.1, 2 grams from Bar no.2, 6 grams from Bar no.3 and 8 grams from Bar no.4 were taken out and placed in a plastic bags. A receipt regarding the aforesaid weight is obtained from PW-2 Prabhudayal Kishanlal Thakore and kept on

record. He has testified that Upon asking Rajeshkumar regarding the quantity which was found, he stated the same to have been supplied by Surendrakumar Kushva. Upon asking about any licence or permission for trafficking the quantity of Charas illegally, both the persons replied in negative. He has testified that the samples, taken from the Charas Bars for FSL, were kept in plastic bags and stappled and the same were placed in plastic small boxes and the slips bearing signature of the panchas were kept and tied with string. He has testified that the wax seal of PI, LCB Railway Vadodara, in English, was affixed thereon and placed in different cloth bags and sealed again. He has testified that all the other articles recovered from both the persons were also seized.

12. He further testified that the complaint is filed for the aforesaid incident, which is on record at exh.40. A perusal of exh. 40 – complaint, it is seen that he has deposed as per the complaint lodged by him with LCB police station, Western Railway, Vadodara. His oral testimony gets complete corroboration from the complaint, and there is no contradiction between his oral testimony and the complaint. It is also mentioned in the complaint about strict compliance of Section 50 of the NDPS Act.

13.It may be noted that PW-4 Premdhar Amarnath Shukla was cross-examined by the leaned advocate of the accused and a lot of suggestions were made with regard to non-compliance of statutory provisions and mandatory provisions contained under the NDPS Act. However, he repelled all such suggestions and he stuck to the statement that all the statutory and mandatory provisions of the NDPS Act as required were followed. According to this Court this witness has successfully withstood the test of cross-examination and nothing substantial has been brought out during his cross-examination which would impeach his credibility.

14.The prosecution has thereafter examined and relied upon the oral testimony of PW-10 M.U.Mirsa at exh. 71, page 87 of the paper book. He has inter alia testified that on 17.9.2000 at 2:00 pm he along with other police officers of the LCB went for patrolling at platform no. 2 and 3 of Vadodara Railway Station. PW-4, Premdhar Amarnath Shukla and other Police Officers were with him. At that time they saw two persons with the bags, near water tap. On seeing them, they stood and therefore they doubted upon them and inquired. During inquiry both of them were frightened,

therefore, both were brought to LCB Office. Thereafter, 2 panchas were called. It may be noted that he has deposed similar version as deposed by PW-4 Premdhar Amarnath Shukla at exh. 39. Therefore, according to us, it is not necessary to reproduce his evidence again in verbatim. He was also cross-examined at length by the learned advocate of the accused. During cross-examination, he also repelled all the suggestions with regard to non-compliance of Section 50 of the NDPS Act as well as in keeping the muddamal in proper and safe custody and muddamal was tampered with during the course of it's journey from Police Station to FSL. He successfully withstood the test of cross-examination and nothing substantial has been brought out from his cross-examination to impleach his credibility.

15.The prosecution has thereafter examined and relied upon the oral testimony of PW-3 Laxmansinh Chandersinh Rathod at exh. 36, page 56 of the paper book. He has also deposed on the similar line as deposed by PW-4 – Premdhar Amarnath Shukla and PW-10 – M.U.Mirza.

16.The prosecution has examined and relied upon the evidence of PW-6 Natwarsinh Sankalsinh at exh. 59, page 73 of the paper book. He has

testified that PW-7 Dalpatsinh Kalyansinh, Writer Constable had handed over the muddamal Charas for dispatching the same to FSL, which were in 4 samples in sealed and intact condition. He has dispatched the same to FSL, Ahmedabad.

17.The prosecution thereafter examined and relied upon the oral testimony of PW-7 Dalpatsinh Kalyansinh at exh. 63, page 78 of the paper book. He has testified that on 17.9.2000 Devjibhai Narrotambhai, PSO has handed over the muddamal Charas to him in four parcel in sealed and intact condition for preserving it, which he has preserved in cupboard. He has handed over the said muddamal to PW-6 Natwarsinh Kalyansinh on the next date with forwarding note and form to be dispatched to the FSL, Ahmedabad.

18.The prosecution has examined and relied upon the evidence of PW-8 Omkarnath Shivbahadur Tewari, at exh. 66, page 82 and PW-9 Ghanshyamsinh Mansinh Zala, at exh. 70, page 85, who were the investigating officers. They have also stated about the role played by them and in forwarding of the charge sheet.

19.It may be noted that PW-3 Laxmansinh Chandersinh Rathod, Police Constable, PW-6 Natwarsinh Kalyansinh, Head Constable, PW-7 Dalpatsinh Kalyansinh, Crime Writer, PW-8

Omkarnath Shivbahadur Tewari and PW-9 Ghanshyamsinh Mansinh Zala, who are the police personnels, have been cross-examined by the learned advocate of the defence at length. They withstood the test of cross-examination. Nothing substantial has been brought from their evidence which would impeach their credibility or doubt about role played by them.

20.So far as the compliance of Section 50 of the NDPS Act is concerned, the evidence is consistent. At the time of interception and apprehension, PW-4 Premdhar Amarnath Shukla and PW-10 M.U.Mirza had informed the accused that they are gazetted officers and if the so desired, they could be searched in presence of gazetted officer or Magistrate or if they so desired, they themselves may search them. The accused preferred second option and they volunteered to be searched by PW-4 and PW-10. During the search of the person of the accused some currency note as well as railway tickets were recovered. It may be noted that since the contraband article Charas was found from bag which was carried by the accused and opened by the accused by key which was lying in his pocket, according to this Court, compliance of Section 50 is not necessary. However, Police Officer gave option while searching the person of the accused.

21.So far as the journey of the muddamal from the stage of interception of the accused, search of the person of the accused, seizure and sealing of charas till it reached FSL has also been duly proved. FSL reports at exh. 74 and 75 at pages 95 to 100 of the paper book clearly show that muddamal was received by the FSL intact in sealed condition and on analysis of the muddamal it was found to be Charas. Therefore, during the journey of the muddamal from seizure and sealing till it reached FSL for analysis there was no question of tampering with the said muddamal and in this connection evidence of PW-6 Natwarsinh Sankalsinh, who has dispatched the muddamal to FSL and PW-7 Dalpatsinh Kalyansinh, who has preserved the contraband article Charas in his safe custody, unequivocally states that there is no possibility of of tampering with the said muddamal Charas.

22.The contention that there is a discrepancy in the weight of four parcels of muddamal in panchnama at exh. 17 and FSL report at exh. 74 and 75, therefore, possibility of tampering with the muddamal cannot be ruled out, has no substance. It is true that there is some discrepancy in weight of four parcels but the discrepancy is so meager which varies from 1 gram to 1 ½ gram only which pales

insignificance and it is bound to differ on different scales and on this count alone prosecution case cannot be thrown oerboard.

23.By referring to the oral testimonies of P.W.1, Virendra Omprakash Sharma at exh. 16, page 33 and PW-5 Kalicharan Harilal Agarwal at exh. 42, page 68, it is contended by Ms. Sadhana Sagar, learned advocate of the accused, that they are panch witnesses and said to be independent witnesses, have not supported the prosecution case and, therefore, the prosecution has failed to prove the panchnama and hence the prosecution case cannot be believed. According to this Court, the aforesaid submission is absolutely feeble and has no substance and merit.

24.It is well settled by catena of decisions of the Supreme Court that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized hat the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision to the case were to depend solely on the testimony of

panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panch as so far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by the court on the ground that they are police officers. On the facts and in the circumstances of the case, this Court finds that the testimonies of P.W.4, P.W. 10, PW-3, PW-6, PW-7, PW-8 and PW-9 not only inspire confidence but get corroboration from the other evidence on record and from their evidence, the contents of the panchnama, which is on record at Ex.17, are proved.

25.Similarly, though PW-2 Prabhudayal Kishanlal Thakore exh. 36, page 50, Manager of Samrat Hotel, who has weighed the muddamal with his electric weighing machine, has not supported the prosecution case and has turned hostile, also pales insignificance in view of the evidence of sterling quality of prosecution witnesses, such as P.W.4, P.W. 10, PW-3, PW-6, PW-7, PW-8 and PW-9 and from their evidence, case against the accused is established and therefore, turning hostile of these witnesses does not at all hamper the

case of the prosecution case.

26.It may also be noted that the accused was apprehended and arrested by PW-4 and PW-10 while they were patrolling at platform no. 2 and 3 of the Vadodara Railway Station. Therefore, it was a chance recovery, and therefore, it is not necessary to comply with Sections 41 and 42 of the NDPS Act.

27.On overall view of the matter and in view of the aforesaid evidence, according to this Court, there is no manner of doubt that contraband article Charas preserved in his bag which was opened with the key, which was kept in his bag. Necessary formalities of search and seizure were complied with in presence of panchas and the statutory requirements and formalities contained under the NDPS Act were followed and the samples were sent to FSL after following the procedure under the NDPS Act.

28.On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial court, as according to us, no other conclusion is

possible except the one reached by the trial court in the facts and circumstances of the case.

29. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the trial court is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

30. In aforesaid view of the matter, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. The sentence awarded to the accused is minimum and has to be maintained.

31. At this stage, it has been pointed out by Mr. L.R.Pujari, learned APP, that the contraband article was charas and possessing the said contraband article, without pass or permit, is punishable under section 21 (b) (ii) of NDPS Act. However, through inadvertent mistake, the trial court has framed charge against the accused for commission of the offence punishable under Section 8 (c) read with Section 21 of the

NDPS Act whereas convicted u/s 8(c) read with Section 22 of the NDPS Act. It is an error in framing the charge u/s 8(c) read with Section 21 of the NDPS Act as well as convicting the accused u/s 8(c) read with Section 22 of the NDPS Act. However, the said error in framing charge or convicting the accused, cannot be said to be failure of justice in view of the provisions of Section 464 of the Code. Therefore, according to him, the conviction recorded against the accused for commission of the offence punishable under Section 8 (c) read with Session 22 of the NDPS Act may be altered into the conviction for commission of the offence punishable under Section 20 (b) (ii) of the NDPS Act.

32.It is true that the trial court has, through inadvertent mistake, framed charge against the accused for commission of offence punishable under section 8 (c) read with section 21 of the NDPS Act, whereas convicted u/s 8(c) read with Section 22 of the NDPS Act, which is a mistake apparent on the face of the record as possessing the contraband article 'charas' without pass or permit, is punishable under section 21 (b) (ii) of the NDPS Act. Section 464 of the Code in terms stipulates that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no

charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. In instant case, according to this court, the error committed by the trial Court in framing the charge has not resulted into failure of justice and no prejudice has been caused to the accused. Therefore, this court, being a Court of appeal, can modify/alter the order of conviction by convicting the accused for commission of offence punishable under section 20 (b) (ii) of the NDPS Act instead of section 8 (c) read with Section 22 of the NDPS Act.

33.On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial court and as the appeal lacks merit, deserves to be dismissed. Of course, the conviction is required to be altered by convicting the accused under Section 20 (b) (ii) of the NDPS Act instead of Section 8 (c) read with Section 22 of the NDPS Act.

34.For the foregoing reasons, the appeal fails and accordingly it is dismissed.

(A.M.Kapadia,J.)

(K.A.Puj,J.)

Jayanti*